

§ 779.349

that its goods are sold at retail by outside salesmen provides no ground for recognizing the establishment as a retail establishment or qualifying it for exemption.

§ 779.349 The 85-percent requirement.

The final requirement for the section 13(a)(4) exemption is that more than 85 percent of the establishment's sales of the goods it makes or processes, measured by annual dollar volume, must consist of sales made within the State in which the establishment is located. A retail establishment of the type intended to be exempt under this exemption may also sell goods which it does not make or process; the 85-percent requirement applies only to the sales of goods which are made or processed at the establishment. This must not be confused with the additional test which requires that the establishment, to be exempt, must derive more than 50 percent of its entire annual dollar volume of sales of goods from sales made within the State. (See § 779.339.) In other words, more than 85 percent of the establishment's annual dollar volume of sales of goods made or processed at the establishment, and more than 50 percent of the establishment's total annual dollar volume of sales of all the goods sold by the establishment, must be derived from sales made within the State. An establishment will not lose an otherwise applicable exemption under section 13(a)(4) merely because some of its sales of goods made or processed at the establishment are sales for resale or are not recognized as retail sales in the particular industry. Sales for resale, such as wholesale sales, and other sales not recognized as retail sales in the industry, will be counted in the 25-percent tolerance permitted by the exemption. (Cf. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388.) Thus, for example, a bakery otherwise meeting the tests of 13(a)(4) making and selling baked goods on the premises nevertheless will qualify as an exempt retail establishment even though it engages in the sale of baked goods to grocery stores for resale if such sales, together with other sales not recognized as retail in the industry, do not exceed 25 percent of the total annual dollar volume of the establishment.

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§ 779.350 The section 13(a)(4) exemption does not apply to service establishments.

The section 13(a)(4) exemption applies to retail establishments engaged in the selling of goods. It does not apply to service establishments. If the establishment is a service establishment, it must qualify under section 13(a)(2) in order to be exempt. A retail establishment selling goods, however, also may perform services incidental or necessary to the sale of such goods, such as a delivery service by a bakery store or installation of antennas by a radio dealer for his customers, without affecting the character of the establishment as a retail establishment qualified for exemption under section 13(a)(4).

ENGAGING IN CONTRACT TELEGRAPH
AGENCY OPERATIONS; SECTION 13(a)(11)

§ 779.351 Exemption provided.

Section 13(a)(11) (See § 779.301) exempts from sections 6 and 7 of the Act any employee or proprietor who is engaged in handling telegraphic messages for the public in a retail or service establishment which qualifies as an exempt retail or service establishment under section 13(a)(2), if the conditions specified in section 13(a)(11) are met and the provisions of section 6 and 7 of the Act would not otherwise apply.

§ 779.352 Requirements for exemption.

The requirements of the exemption are: (a) The establishment in which the employee or proprietor works must qualify as an exempt retail or service establishment under section 13(a)(2) of the Act; (b) the employee or proprietor must be engaged in handling telegraphic messages for the public pursuant to an agency or contract arrangement with a telegraph company; (c) such employee or proprietor must be one to whom the minimum wage and overtime pay provisions of the Act would not apply in the absence of such handling of telegraphic messages (See *Western Union Tel. Co. v. McComb* 165 F. 2d. 65 (CA-6), certiorari denied, 333 U.S. 362); and (d) the exemption applies only where the telegraphic message revenue

Wage and Hour Division, Labor

§ 779.354

does not exceed \$500 a month. For purposes of this exemption only, in determining whether a retail or service establishment meets the percentage tests contained in section 13(a)(2) of the Act, the receipts from the telegraphic message agency will not be included.

CLASSIFICATION OF SALES AND ESTABLISHMENTS IN CERTAIN INDUSTRIES

§ 779.353 Basis for classification.

The general principles governing the application of the 13(a)(2) and 13(a)(4) exemptions are explained in detail earlier in the subpart. It is the purpose of the following sections to show how these principles apply to establishments in certain specific industries. In these industries the Divisions have made special studies, held hearings or consulted with representatives of industry and labor, to ascertain the facts. Based upon these facts the following determinations have been made as to which sales or establishments are, and which are not, recognized as retail in the particular industry.

LUMBER AND BUILDING MATERIALS DEALERS

§ 779.354 Who may qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) *Section 13(a)(2)*. An establishment engaged in selling lumber and building materials may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. It must appear that:

(1) The establishment is not in an enterprise described in section 3(s) of the Act or, if it is, its annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) is less than \$250,000; and

(2) More than 50 percent of the establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located; and

(3) 75 percent or more of the establishment's annual dollar volume of sales of goods or services (or of both) is made from sales which are not for resale and are recognized as retail sales of goods or services in the industry.

These requirements are further explained in §§ 779.301 through 779.343.

(b) *Section 13(a)(4)*. An establishment which makes or processes lumber and building materials which it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements (see *Arnold v. Kanowsky*, 361 U.S. 388) of that exemption. It must appear that:

(1) The establishment qualifies as an exempt retail establishment under section 13(a)(2) (see paragraph (a) of this section and § 779.350); and

(2) The establishment is recognized as a retail establishment in the industry (see § 779.347 and paragraph (c) of this section); and

(3) The goods which such establishment makes or processes for sale are made or processed at the retail establishment which sells them (see § 779.348); and

(4) More than 85 percent of the annual dollar volume derived by the retail establishment from sales of goods so made or processed therein is made within the State in which the establishment is located (see §§ 779.349, 779.339 through 779.341).

(c) *Establishments recognized as retail in the industry*. An establishment which meets the requirements for exemption under section 13(a)(4) which are stated in paragraphs (b)(1), (3), and (4) of this section is recognized as retail establishment in the industry within the meaning of paragraph (b)(2) of this section if its annual dollar volume of sales of goods made or processed at the establishment does not exceed 50 percent of the annual dollar volume which it derives from sales that are recognized as retail and are not made for resale.

(d) *Establishments lacking a "retail concept."* The exemptions provided by sections 13(a)(2) and 13(a)(4) of the Act do not apply to establishments in an industry in which there is no traditional concept of retail selling or servicing (see § 779.316), such as the establishment of a building contractor (see § 779.317; *Goldberg v. Dakota Flooring Co.*, 15 WH Cases 305), or a factory (see § 779.347).